

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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In the Matter of)	Docket No. 2012-6 CRB CD 2004-2009
)	(Phase II)
Distribution of the 2004-2009)	
Cable Royalty Funds)	
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In the Matter of)	Docket No. 2012-7 CRB SD 1999-2009
)	(Phase II)
Distribution of the 1999-2009)	
Satellite Royalty Funds)	
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**MPAA-REPRESENTED PROGRAM SUPPLIERS AND SETTling DEVOTIONAL
CLAIMANTS' JOINT MOTION IN LIMINE AND MOTION FOR SUMMARY
DISPOSITION AS A PAPER PROCEEDING**

The MPAA-Represented Program Suppliers ("MPAA") and the Settling Devotional Claimants ("SDC") hereby move in limine to exclude all exhibits offered by Independent Producers Group ("IPG") and, following that exclusion, to enter summary disposition under 17 U.S.C. § 803(b)(5) as a paper proceeding adopting the methodologies and shares set forth in MPAA's Written Direct Statement (dated Aug. 22, 2016) and the SDC's Written Direct Statement (dated Aug 22, 2016).

IPG has informed the parties that its sole witness in this proceeding, Dr. Charles D. Cowan, has refused to appear for the hearing scheduled to commence on April 9, 2018, thereby rendering his Amended Written Direct Testimony (IPG Ex. 9000) inadmissible. IPG's only remaining evidence consists of purportedly designated testimony from prior proceedings that IPG failed to designate properly as provided by the Judges' rules. (IPG Exs. 9001-21). As a result of IPG's effective withdrawal of Dr. Cowan's testimony, its failure to submit other

admissible evidence, and its failure to submit any rebuttal to MPAA's and SDC's written direct statements, there is no longer any genuine issue of material fact in this matter, and the case is ripe for summary disposition as a paper proceeding pursuant to 17 U.S.C. § 803(b)(5). *See Order On Joint Sports Claimants' Motion For Summary Adjudication Dismissing Claims Of Independent Producers Group* at 2 (August 29, 2014) ("August 29, 2014 Order").

I. Background

This case is currently scheduled for a hearing to commence on April 9, 2018. On March 27, 2018, the Judges entered their Order Setting Prehearing Schedule, directing the parties to exchange witness and exhibit lists on March 30, 2018, to meet and confer, and to file information pertaining to witnesses and exhibits on April 4 and 5, 2018. In an exchange of emails on March 30, 2018, counsel for IPG requested consent to submit the testimony of its sole witness, Dr. Cowan, on the papers without cross-examination. Counsel for MPAA and the SDC refused consent and demanded the opportunity to cross-examine Dr. Cowan.

On April 2, 2018, one week before the commencement of the scheduled hearing, counsel for IPG sent an email to counsel for MPAA and the SDC announcing for the first time that Dr. Cowan has refused to appear to testify or face cross-examination: "In spite of IPG's request that he appear at the hearings before the Copyright Royalty Board beginning April 9, 2018, for his own reasons, Dr. Cowan will not be appearing to testify or face cross examination." *See* Exhibit A, E-mail from B. Boydston (Apr. 2, 2018). IPG's counsel also provided an exhibit list in which the only exhibits identified were IPG's Amended Written Direct Statement of October 13, 2016, consisting only of Dr. Cowan's written testimony and a series of purportedly designated testimony. *See* Exhibit B, IPG's proposed Exhibit List.

IPG has filed no rebuttal testimony to MPAA's and the SDC's written direct statements.

II. All of IPG's Exhibits Should Be Excluded.

Because Dr. Cowan refuses to take the stand, his written testimony is not admissible. "No evidence, including exhibits, may be submitted without a sponsoring witness, except for good cause shown." 17 C.F.R. § 351.10(a). A witness's unexplained refusal to take the stand and face cross-examination is not good cause. Although the Judges have discretion to accept declarations or other hearsay (*id.*), the parties are unaware of any case in which the Judges have accepted the substantive written testimony of an expert witness whose cross-examination has been requested but who has nevertheless failed to appear for a live hearing. As a concrete example, in the 2000-2003 Cable Phase II proceeding, the Judges rejected the written testimony of IPG expert witness Mr. Thomas Moyer, who presented written rebuttal testimony but then failed to appear to testify in person. The Judges' ruling on this issue is reflected the Final distribution order, 78 Fed. Reg. 64,984, 64,992 n. 28:

IPG attempted to introduce only the written testimony of a producer of a syndicated children's show, Mr. Thomas Moyer He was subpoenaed by MPAA to testify in person at the hearing, but he did not appear. Accordingly, the Judges did not admit Mr. Moyer's Written Rebuttal Testimony.

Final Distribution Order, No. 2008-2 CRB CD 2000-03 (Phase II), 78 Fed. Reg. 64,984, 64,992 n. 28 (Oct. 30, 2013) (affirmed in part, *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132, 142 (D.C. Cir. 2015); vacated in part on other grounds, *Settling Devotional Claimants v. Copyright Royalty Board*, 797 F.3d 1106 (D.C. Cir. 2015)). Dr. Cowan's appearance here is more critical than Mr. Moyer's in that prior case. First, unlike Mr. Moyer, Dr. Cowan is IPG's sole witness. Second, Dr. Cowan is the architect of the methodology upon which IPG's proposed share allocations for MPAA and IPG are based. Thus, only he could answer questions about that methodology. Third, as the Judges may recall, there were many

questions surrounding the revisions to Dr. Cowan’s original testimony – questions that triggered the avalanche of motions practice that ultimately led to MPAA and SDC’s pending motions for sanctions against IPG.¹ Without Dr. Cowan’s appearance, MPAA and IPG have been denied the opportunity to question Dr. Cowan about the circumstances surrounding his revisions, and the involvement of IPG and its counsel. Clearly, under these circumstances, Dr. Cowan’s written testimony must not be admitted.

Similarly, none of IPG’s purported designated testimony is admissible, because none was filed in its entirety along with IPG’s written direct statement, as required by 37 C.F.R. § 351.4(b)(2) (“If a party intends to rely on any part of the testimony of a witness in a prior proceeding, the complete testimony of that witness (i.e., direct, cross and redirect examination) must be designated. The party submitting such past records and/or testimony shall include a copy with the written direct statement.”). The Judges considered and addressed precisely this situation in the earlier stage of this case, in which the Judges refused admission of a transcript of Paul Lindstrom’s testimony offered by IPG, on the ground that IPG did not submit a complete copy of the designated testimony with its written rebuttal statement: “The Judges will not consider the portion of Mr. Lindstrom’s prior testimony offered by IPG, as it is an incomplete submission under the Judges’ rules.” *Order Denying in Part and Granting in Part MPAA Motions Relating to IPG Testimony and Exhibits* (July 20, 2015), at 4.

For these reasons, all of IPG’s proposed exhibits are inadmissible and should be excluded.

¹ See MPAA Motion To Impose Sanctions Against IPG For Disregarding The Judges’ Procedural Rules (filed March 10, 2017); SDC Motion For Sanctions Against IPG And Its Counsel (filed March 10, 2017).

III. In the Absence of Any Admissible Evidence From IPG, There Is No Genuine Issue of Material Fact, and Summary Disposition as a Paper Proceeding Is Required.

With the effective withdrawal of IPG's sole witness, the exclusion of all of IPG's exhibits, and the fact that IPG has submitted no rebuttal to MPAA's and the SDC's written direct statements, MPAA's and the SDC's written direct statements will be uncontroverted. Accordingly, there will be no genuine issues of material fact remaining in this proceeding.² Under these circumstances, the Judges have ruled that a summary adjudication as a paper proceeding is appropriate. 17 U.S.C. § 803(b)(5)(B); 17 C.F.R. § 351.3(c); August 29, 2014 Order at 2. Although the statute and rules seem to anticipate that all parties have filed admissible written direct statements and have sponsoring witnesses who are prepared to appear at a hearing, it is the inadmissibility of IPG's evidence and the effective withdrawal (or refusal to appear) of IPG's sole witness that has resulted in the circumstance in which MPAA's and the SDC's cases are now uncontroverted. Accordingly, a paper proceeding should be decided solely on the basis of MPAA's and the SDC's unrebutted and uncontroverted written direct statements, and summary disposition should be entered on the basis of MPAA's and the SDC's proposed methodologies and shares, as to which there is no genuine issue as to any material fact. *See* August 29, 2014 Order at 1-2, and n.2 (recognizing that a Section 803(b)(5) ruling granting summary adjudication on the basis of the existing record was appropriate without additional briefing).

² The SDC and MPAA offered to IPG to enter into a stipulation along the lines suggested by the Judges in the 2010-13 distribution proceeding - requesting the Judges to enter an agreed order adopting the SDC and MPAA's distribution methodologies and proposed shares in the Devotional and Program Suppliers categories, respectively, and preserving the parties' opportunity to appeal on claims issues and other issues unrelated to distribution methodology. *See, e.g., Order Denying Joint Motion to Strike Multigroup Claimants' Written Direct Statement and to Dismiss Multigroup Claimants from the Distribution Phase*, No. 14-CRB-0010-CD/SD (2010-13) (Mar. 26, 2018), at 4 ("The Judges suggested as much to counsel in a conference call"). IPG declined the offer.

Accordingly, following the exclusion of all exhibits offered by IPG, MPAA and the SDC request entry of summary disposition of the following proposed shares set forth in MPAA's Written Direct Statement (Aug. 22, 2016)³ and the SDC's Written Direct Statement (Aug 22, 2016):

Program Suppliers' Cable Fund

Cable Royalty Year	MPAA Share	IPG Share
2004	99.60%	0.40%
2005	99.60%	0.40%
2006	99.34%	0.66%
2007	99.44%	0.56%
2008	99.28%	0.72%
2009	99.44%	0.56%

Program Suppliers' Satellite Fund

Satellite Royalty Year	MPAA Share	IPG Share
2000	99.54%	0.46%
2001	99.75%	0.25%
2002	99.74%	0.26%
2003	99.65%	0.35%
2004	99.87%	0.13%
2005	99.73%	0.27%
2006	99.65%	0.35%
2007	99.77%	0.23%
2008	99.78%	0.22%
2009	99.57%	0.43%

Devotional Cable Fund

Cable Royalty Year	SDC Share	IPG Share
2004	89.1%	10.9%
2005	89.2%	10.8%
2006	87.5%	12.5%
2007	92.4%	7.6%
2008	90.2%	9.8%
2009	90.0%	10.0%

³ The Program Suppliers shares for the 2008 Satellite Royalty Year have been corrected to reflect the Judges' *Order Granting IPG Fourth Motion For Modification Of March 13, 2015 Order* at 1-2 (October 27, 2016).

Devotional Satellite Fund

Satellite Royalty Year	SDC Share	IPG Share
1999	100%	0%
2000	100%	0%
2001	98.8%	1.2%
2002	98.5%	1.5%
2003	97.2%	2.8%
2004	98.8%	1.2%
2005	98.4%	1.6%
2006	91.2%	8.8%
2007	97.1%	2.9%
2008	Previously decided	Previously decided
2009	97.9%	2.1%

IV. Conclusion

For the foregoing reasons, MPAA and the SDC request the Judges to exclude all IPG evidence and enter summary disposition on a paper proceeding adopting MPAA's and the SDC's proposed methodologies and shares in the Program Suppliers and Devotional Categories respectively with regard to all cable and satellite funds at issue in this proceeding.

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Date: April 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2018, a copy of the foregoing was sent electronically and served via the eCRB system on the following:

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/s/ Matthew J. MacLean

Matthew J. MacLean

EXHIBIT A

MacLean, Matthew J.

From: Brian D. Boydston, Esq. <brianb@ix.netcom.com>
Sent: Monday, April 2, 2018 2:59 PM
To: goo@msk.com; lhp@msk.com; MacLean, Matthew J.; Warley, Michael A.
Subject: 1999-2009 Proceeding

Dear counsel,

In spite of IPG's request that he appear at the hearings before the Copyright Royalty Board beginning April 9, 2018, for his own reasons, Dr. Cowan will not be appearing to testify or face cross examination.

Brian Boydston
Counsel for Independent Producers Group

EXHIBIT B

EXHIBIT NO.	DESCRIPTION
9000	Written Direct Statement of IPG, filed October 13, 2016.
9001	Designated Prior Testimony of JOHN FULLER, Written Direct Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I), filed December 2, 2002.
9002	Designated Prior Testimony of JOHN FULLER, Oral Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I) (May 14, 2003).
9003	Designated Prior Testimony of JOHN FULLER, Written Rebuttal Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I), filed June 20, 2003.
9004	Designated Prior Testimony of JOHN FULLER, Oral Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I) (July 16, 2003).
9005	Designated Prior Testimony of JAMES TRAUTMAN, Written Direct Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I), filed December 2, 2002.
9006-9007	Designated Prior Testimony of JAMES TRAUTMAN, Oral Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I) (April 24-25, 2003).
9008	Designated Prior Testimony of JAMES TRAUTMAN, Oral Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I) (July 17, 2003).

9009

Designated Prior Testimony of MICHAEL EGAN, Written Direct Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I), filed December 2, 2002.

9010

Designated Prior Testimony of MICHAEL EGAN, Oral Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I) (April 30,2003).

9011

Designated Prior Testimony of JUDITH ALLEN, Written Direct Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I), filed December 2, 2002.

9012

Designated Prior Testimony of JUDITH ALLEN, Oral Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I) (May 29, 2003).

9013

Designated Prior Testimony of GREGORY ROSSTON, Written Direct Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I), filed December 2, 2002.

9014

Designated Prior Testimony of GREGORY ROSSTON, Oral Testimony submitted in Docket No. 2001-8 CARP CD 98-99 (Phase I) (May 9, 2003).

9015

Designated Prior Testimony of Dr. Laura Robinson, Written Direct Testimony, submitted in Docket No. 2012-6 CRB CD 2004-2009 (Phase II), filed July 8, 2014.

9016

Designated Prior Testimony of Michael Egan, Oral Testimony in Consolidated Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II), Transcript from April 15, 2015. Designated Prior Testimony of Dr. Laura Robinson, Written Direct Testimony, submitted in Docket No. 2012-7 CRB SD 1999-2009 (Phase II), filed July 8, 2014.

9017-9020

Designated Prior Testimony of Dr. Laura Robinson, Oral Testimony, submitted in Consolidated Docket nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II); Transcripts from April 15-17, 2015.

9021

Designated Prior Testimony of Michael Egan, Written Rebuttal Testimony submitted in Consolidated Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II), filed March 27, 2015.

Certificate of Service

I hereby certify that on Wednesday, April 04, 2018 I provided a true and correct copy of the MPAA and SDC Joint Motion in Limine and for Summary Disposition to the following:

Independent Producers Group (IPG), represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

MPAA-Represented Program Suppliers, represented by Lucy H Plovnick served via Electronic Service at lhp@msk.com

Signed: /s/ Matthew J MacLean